No. 82-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN DOE,

Petitioner,

—v.—

EXECUTIVE SECURITIES CORPORATION,
BY CAMERON F. MACRAE, III, AS TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

When a full reading of the decision of the United States Court of Appeals for the Second Circuit demonstrates that the Court of Appeals scrupulously followed *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), and the other precedents of this Court which establish the standards for releasing grand jury transcripts, should this Court nonetheless review that decision on *certiorari*, solely because the Court of Appeals failed to state, in so many words, that the District Court "abused its discretion" when it refused to release the grand jury transcripts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondent Cameron F. MacRae, III (hereinafter, the "Trustee"), as trustee for Executive Securities Corporation ("Executive"), submits this brief in opposition to the petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit in *Application of Executive Securities Corporation*, 702 F.2d 406 (2d Cir. 1983).

STATEMENT OF THE CASE

A. The Nature of the Proceedings

In the decision which Petitioner John Doe (hereinafter "Doe") asks this Court to review on *certiorari*, the United States Court of Appeals for the Second Circuit held that the transcripts of testimony which Doe gave before a federal grand jury should be released to Respondent, who is the court-appointed Trustee for Executive, a broker-dealer being liquidated pursuant to the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa *et seq.*

Although the Second Circuit was careful to point out that "witnesses do not have the prerogative to effect the release of the transcripts of their own grand jury testimony," 702 F.2d at 408-409, the Second Circuit found it "highly significant" that Doe had "waived his right to object to the release of the [grand jury] records," 702 F.2d at 409, by agreeing to the entry of a consent order which provided for the release of Doe's testimony if Doe (who is a lawyer) or his law firm disputed certain factual allegations which the Trustee made in a fraudulent conveyance action pending in the Cayman Islands. Because Doe had admittedly breached his agreement not to contest these facts, the Second Circuit found that the Trustee had a particularized need for Doe's grand jury testimony for use in the Cayman Island proceedings, and, after examining all relevant factors, the court held that the Trustee's need for the transcripts outweighed "the minimal public interest in grand jury secrecy in this case. . . ." 702 F.2d at 410.

In striking this balance, the Second Circuit rejected Doe's argument, which Doe also raises in this Court, that release of Doe's testimony would discourage future witnesses from testifying freely and voluntarily before a grand jury. The Second Circuit observed that Doe, unlike the typical grand jury witness, had waived his interest in the confidentiality of his grand jury testimony by an agreement which Doe made after he had

testified, with full knowledge both of the contents of his testimony and of the possible implications of its release. Thus, despite Doe's arguments that the Second Circuit's decision will have far-reaching implications, the decision below will have no chilling effect on future grand jury witnesses because, as the Second Circuit correctly observed, "[p]rospective witnesses can be assured that their desire for secrecy will be given all due consideration, as long as they do not enter into a similar waiver." 702 F.2d at 409 (footnote omitted).

B. Proceedings Before the District Court

The background of this controversy is fully described in the opinion of the Second Circuit and will be briefly summarized here.

The Trustee was appointed by the United States District Court for the Southern District of New York on the motion of the Securities Investor Protection Corporation ("SIPC"), and has been pursuing litigation on Executive's behalf against Executive's former president, Richard O. Bertoli. Mr. Bertoli, however, has claimed to be impoverished and unable to pay any judgment which the Trustee may obtain against him. 702 F.2d at 406.

In April, 1981, the United States Attorney for the Southern District of New York obtained an *ex parte* order which allowed him to disclose to the Trustee certain grand jury records, including the transcript of Doe's testimony. The grand jury material revealed that Mr. Bertoli had fraudulently transferred $210,000 to Bland Investments, S.A. ("Bland"), a Cayman Island corporation. Doe, an officer of Bland and a Cayman Island attorney, had testified to the grand jury that the beneficial owner of Bland was one Alfred B. Averell, "a close business associate of Bertoli's and a former vice president of Executive." 702 F.2d at 408. Armed with this information, the Trustee prepared to file a fraudulent conveyance action in the Cayman Islands to recover the $210,000 which was transferred to Bland. 702 F.2d at 407-408.

Before the Cayman Islands action could be commenced, Doe appeared by counsel in the Southern District of New York and made an application to reseal his grand jury testimony, arguing that he might be subject to prosecution in the Cayman Islands for having revealed the identities of Bland's principals in violation of the Cayman Islands Confidential Relationship (Preservation) Law. Doe's motion was not decided, however, because Doe and the Trustee entered into a stipulation, endorsed as a consent order by Judge Edelstein, which resealed Doe's testimony on the following terms:

> [A]s long as [Doe] and his law firm concede and do not deny in any litigation in the Cayman Islands that insofar as their knowledge extends, Alfred B. Averell was at all material times the beneficial owner of Bland Investments, S.A., the United States Attorney for the District shall not release or divulge to any person or entity the transcript of any testimony by [Doe] before a federal grand jury on December 1, 1980.

The order also specified that a further order from the District Court would be necessary to reopen the sealed record. 702 F.2d at 408.

Thereafter, the Trustee commenced a fraudulent conveyance action in the Cayman Islands, and despite the agreement which had been reached in the District Court, Doe's law firm, representing both Bland and Averell, "promptly breached the condition of the consent order by denying that Averell was the beneficial owner of Bland Investments." 702 F.2d at 408. Moreover, Doe's firm counterclaimed against the Trustee for $200,000 alleging wrongful interference with Bland's business affairs. 702 F.2d at 408.

The Trustee then returned to the District Court to request the reopening of the grand jury transcripts, but the District Court denied that application. Judge Duffy first held that because a witness cannot stipulate to the release of his grand jury testimony, the consent order entered by Judge Edelstein

was not self-executing. The District Court then attempted to balance the need for disclosure of the grand jury testimony against the interests protected by grand jury secrecy and denied the Trustee's request for disclosure because, *inter alia*, release of the transcripts might subject Doe to prosecution under the Cayman Islands secrecy laws. 702 F.2d at 408.

C. The Second Circuit's Decision

The Trustee appealed the District Court's order denying the release of Doe's grand jury testimony to the United States Court of Appeals for the Second Circuit, and a panel composed of Judges Kaufman, Timbers and Newman unanimously reversed.

The Second Circuit agreed with the District Court that a grand jury witness cannot stipulate to the release of his testimony, pointing out that this Court had held in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), that grand jury secrecy serves a number of societal interests in addition of those of the witness. However, the Second Circuit held that the District Court erred "in its conclusion that, because Doe could not effectively agree to release his testimony, his stipulation was without legal significance." 702 F.2d at 409.

The Second Circuit observed that "Doe entered into this consent agreement with full knowledge of the risk of prosecution under Cayman law if a breach of the agreement were to result in release of his testimony." 702 F.2d at 409 (footnote omitted). The Second Circuit then held that Doe's acquiescence in the agreement had the legal effect of waiving any interest he himself might have in maintaining the secrecy of his testimony:

> By using the agreement to secure Judge Edelstein's granting of the motion to reseal, Doe waived his right to have another District Judge consider whatever interest he personally might have in keeping his grand jury testimony secret. Doe's agreement to have his testimony released if his law firm denied Averell's ownership distinguished him

> from an ordinary grand jury witness seeking to keep testimony secret.

702 F.2d at 409.

Having thus held that the District Court erred when it relied on factors of individual concern to Doe, such as his fear of prosecution, the Second Circuit then considered the relevance of the more general societal interests served by grand jury secrecy, which this Court identified in its *Douglas Oil* opinion. The Second Circuit first noted that the government, which normally asserts "any significant public interest in maintaining the secrecy of grand jury records" had initiated the release of Doe's testimony to the Trustee and took no position on the appeal. 702 F.2d at 409, n. 3.

As mentioned above, the Second Circuit rejected Doe's principal argument that release of Doe's testimony would deter future witnesses from cooperating with the grand jury, because Doe was in the highly unusual posture of having voluntarily waived his interest in confidentiality, and other witnesses could protect themselves by declining to enter into similar waivers. 702 F.2d at 409.

The Second Circuit also found that "other traditional justifications" for grand jury secrecy "are inapplicable in this case." 702 F.2d at 410. The court noted that there was no danger that the grand jury would be influenced by the release of Doe's transcript, because the grand jury's term had expired, and the Trustee had agreed to the redaction of the grand jurors' names from the grand jury records. Further, release of Doe's transcript would not warn the target of the grand jury investigation, Averell, of the pendency of the investigation, because Averell already knew of the investigation and had appeared in the District Court to oppose the release of the grand jury records. 702 F.2d at 410.

The only interest in maintaining grand jury secrecy which the Second Circuit found applicable in this case was the "possibility that Averell's reputation might be tainted by the

release of the news that he was under grand jury investigation." 702 F.2d at 410. While the Second Circuit "[did] not discount the significance of this concern," 702 F.2d at 410, it found that it was outweighed by the Trustee's need for the records. The court accepted the Trustee's "explanations why Cayman discovery offers no alternative means of discovering the information revealed in Doe's testimony," 702 F.2d at 410, n. 6, and that Doe's testimony was necessary not only to pursue the Trustee's own claims in the Cayman Islands, but to defend the Trustee from Bland's counterclaim, asserted by Doe's law firm, that the Trustee had interfered wrongfully with Bland's business.

Finally, the Second Circuit observed that "SIPC and its trustees vindicate important public interests," and that although the Trustee's status "does not, without more, establish his entitlement to release of Doe's grand jury testimony, it is a factor to be weighed in the *Douglas Oil* balancing test." 702 F.2d at 410 (citations omitted).

Having thus completed the balancing test required by *Douglas Oil*, the Second Circuit "conclude[d] that the applicant is entitled to the release of the [grand jury] records." 702 F.2d at 410. Doe's petition for rehearing and suggestion for rehearing *en banc* was denied on April 22, 1983. Doe then submitted his petition for a writ of *certiorari* to this Court. His petition was accompanied by a motion for a stay which was denied by Justice Marshall on May 23, 1983.

REASONS FOR DENYING THE WRIT

The Second Circuit Carefully Followed The Precedents Of This Court, And Even If It Did Not, The Issues Raised In The Petition Are Too Insubstantial To Warrant Review Here.

Although Doe's petition for a writ of *certiorari* relies entirely on supposed inconsistencies between the Second Circuit's decision and this Court's opinion in *Douglas Oil Co. v. Petrol Stops Northwest*, 411 U.S. 211 (1979), the Second Circuit was fully cognizant of the *Douglas Oil* decision and quoted from it at length. 702 F.2d at 409. The Second Circuit recognized that *Douglas Oil* required the application of a balancing test which weighed the need that the Trustee had demonstrated for the release of grand jury materials against the traditional interests that are served by grand jury secrecy. 704 F.2d at 410. The Second Circuit considered each of the justifications for grand jury secrecy which had been discussed in the Court's *Douglas Oil* decision, and found that those considerations either were not presented by the case at hand, or were outweighed by the need for disclosure. Both the analysis which the Second Circuit followed, and the result which it reached, are fully consistent with *Douglas Oil*.

Doe nonetheless argues that the Court should review the Second Circuit's decision on *certiorari* because, according to Doe's petition, "the Court of Appeals did not give proper deference to the exercise of discretion by the District Court, but usurped its function and merely substituted its own desires instead." Petition for Writ at 19. However, as this Court emphasized in *Douglas Oil*, the "abuse of discretion" standard which is applied on appeals from grand jury disclosure orders does not prevent the appellate courts from correcting a clearly erroneous decision by the District Court:

> Generally we leave it to the considered discretion of the district court to determine the proper response to requests

> for disclosure under Rule 6(e). *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. at 399. We have a duty, however, to guide the exercise of discretion by district courts, and when necessary to overturn discretionary decisions under Rule 6(e). *See, e.g., Dennis v. United States*, 384 U.S. 855 (1966).

441 U.S. at 228.

Doe argues that the Second Circuit applied the wrong appellate standard because "[t]here is no discussion anywhere in the Court of Appeals opinion whether the District Court abused its discretion, nor is there any holding to that effect." Petition for Writ at 18-19. That criticism, however, is equally applicable to this Court's decision in *Dennis v. United States*, 384 U.S. 855 (1966), cited with approval in the passage from *Douglas Oil* quoted above. In *Dennis*, the Court reversed the District Court's refusal to release grand jury transcripts, without ever explicitly discussing the question of whether the District Court had abused its discretion. The Trustee respectfully submits that when read in full context, the Second Circuit's decision, like the Court's decision in *Dennis*, reveals that the "abuse of discretion" standard has been properly applied.

Under the "abuse of discretion" standard, the Court of Appeals should not "reweigh the equities or reassess the facts," but it has the responsibility "to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record." *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980). Although the line between these two functions is sometimes difficult to draw, the Second Circuit in this case properly limited itself to the latter. The Second Circuit did not, as Doe suggests, merely reassess the relative weights which the District Court assigned to the various factors bearing on the release of Doe's grand jury testimony. Rather, the Second Circuit identified a fundamental legal error in the District Court's analysis, which led the District Court to assess the issues raised by the Trustee's application in a way which was not "juridically sound."

As discussed above, the Second Circuit decided that the District Court erred, as a matter of law, when it found that because Doe could not stipulate to the release of his grand jury testimony, his agreement with the Trustee was of no legal significance whatsoever. The Second Circuit held that, to the contrary, the agreement had the effect of waiving any interest which Doe *personally* had in maintaining the secrecy of his grand jury testimony. When the Second Circuit performed its own *Douglas Oil* balancing test, excluding factors which were personal to Doe (such as his concern for prosecution in the Cayman Islands), it did so not because it felt the District Court had assigned these factors too great a weight, but because it was erroneous for the District Court to have considered such factors *at all* in view of Doe's waiver. The Court of Appeals thus corrected a basic error of law in the District Court's analysis, rather than merely substituting its judgment for the District Court's, and its decision is therefore fully consistent with an "abuse of discretion" standard of review.

To the extent that Doe's petition seeks to raise issues other than the question of whether the Second Circuit applied the proper standard of review, Doe does nothing more than quarrel with the way in which that court applied the balancing test required by *Douglas Oil*. For example, Doe argues that the Trustee failed to demonstrate "particularized need" for the release of Doe's transcript, Petition for Writ at 19-20, but the Second Circuit accepted the Trustee's showing that the limited pretrial discovery devices available in the Cayman Islands did not provide the Trustee with an alternative means of obtaining the information revealed in Doe's testimony. 702 F.2d at 410, n. 6. Doe's petition also argues the release of Doe's testimony might deter future witnesses from cooperating with grand jury investigations, Petition for Writ at 21-27, but the Second Circuit limited its holding to the facts of this particular case, in which Doe had voluntarily entered into an agreement that waived his interest in the confidentiality of his testimony, and the Second Circuit expressly pointed out that other "[p]rospective witnesses can be assured that their desire for

secrecy will be given all due consideration, as long as they do not enter into a similar waiver." 702 F.2d at 409 (footnote omitted).

In short, the Second Circuit faithfully adhered to the principles articulated in *Douglas Oil* and its progeny, and the petition for a writ of *certiorari* should be denied. However, even if Doe had succeeded in identifying errors in the Second Circuit's analysis, the decision below should not be reviewed by this Court, because the facts before the Second Circuit were *sui generis*. The Second Circuit's decision turned on Doe's voluntary agreement to waive his interest in grand jury secrecy if he or his law firm disputed the Trustee's factual allegations in the Cayman Islands litigation. Because the typical grand jury witness is extremely unlikely to enter an agreement of this sort (and then violate it), the Second Circuit's decision is of limited precedential significance, and even if the Second Circuit had erred (which it did not), its decision therefore would not merit this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Dated: New York, New York
June 20, 1983

Respectfully submitted,

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